

FINANCE AND ADMINISTRATION CABINET
Department of Revenue
(Amendment)

103 KAR 30:190. Interstate and foreign commerce.

RELATES TO: KRS 139.010, 139.105, 139.260, 139.340, 139.470, 139.486

STATUTORY AUTHORITY: KRS 131.130~~(4)~~

NECESSITY, FUNCTION, AND CONFORMITY: KRS 131.130(1) authorizes the Department of Revenue to promulgate administrative regulations for the administration and enforcement of Kentucky tax laws. This administrative regulation interprets ~~[To interpret the]~~ sales and use tax law as it applies to sales in interstate and foreign commerce. The purpose of this administrative regulation is to state, generally, the application of the Commerce Clause of the Constitution of the United States of America to the sales and use tax law.

Section 1. Definitions. (1) "Consummated" means the point at which a sales transaction is completed and accepted to the extent that both the seller and the purchaser are legally committed to fulfill the transaction.

(2) "Industrial machinery" is defined by KRS 139.486(1).

(3) "Receive" means:

(a) Taking possession of tangible personal property;

(b) Making first use of services; or

(c) Taking possession or making first use of digital products, whichever comes first; and

(d) "Receive" does not include possession by a shipping company on behalf of the purchaser.

(3) "Seller" is defined by KRS 139.010(39).

(4) "Use" is defined by KRS 139.010(44). ~~[The purpose of this administrative regulation is to state generally the application of the Commerce Clause of the Constitution of the United States to the Sales and Use Tax Law.]~~

Section 2. Sales Tax: Transactions Consummated in Kentucky. (1) Where tangible personal property is located in this state at the time of its sale ~~[{or is subsequently produced in this state}]~~, and then delivered in this state to the purchaser, the seller shall be ~~[is-]~~subject to the sales tax if the sale is at retail and is consummated in Kentucky. A sale shall not be ~~[is not-]~~presumed to be made in interstate commerce if the purchaser or its ~~[his-]~~representative receives ~~[physical-]~~possession of tangible personal property, receives digital property or makes first use of taxable services~~[such property]~~ in this state. This is true notwithstanding the fact that the purchaser may, after receiving ~~[physical possession of]~~ the property in this state, transport or send the property out of the state for use outside the state or for use in the conduct of interstate commerce.

(2) (a) The sales tax shall ~~[does-]~~not apply to gross receipts from sales if, under the terms of its agreement with the purchaser, the seller makes delivery of tangible personal property sold from a point in this state to a point outside this state, not to be returned to a point within this state if delivery is actually made. Tangible personal property may be delivered by carrier, mail, or any other method of delivery.

(b) The sales tax shall not apply if a shipping company, on behalf of a purchaser, takes possession of the tangible personal property in this state for delivery outside this state, not to be returned to a point within this state, and delivery is actually made.

(3) The sales tax shall not apply to gross receipts from sales of tangible personal property to a common carrier under the conditions that are exempt pursuant to KRS 139.470(4).

~~(a) [in which the seller is obligated, under the terms of his agreement with the purchaser, to make physical delivery of the goods sold from a point in this state to a point outside this state, not to be returned to a point within this state, provided that such delivery is actually made. The tax does not apply to gross receipts from sales in which the seller, under the terms of his agreement with the purchaser, delivers the goods by carrier or by mail from a point in this state to a point outside this state not to be returned to a point within this state.]~~

~~(3) Pursuant to KRS 139.470(5), the sales tax does not apply to gross receipts from sales of tangible personal property to a common carrier, shipped by the seller via the purchasing carrier under a bill of lading, whether the freight is paid in advance or the shipment is made freight charges collect, to a point outside this state and the property is actually transported to an out-of-state destination for use by the carrier in the conduct of its business as a common carrier.]~~ Normally, when a sale by a Kentucky retailer involves a transfer of title and possession of the goods to the purchaser outside this state, the sale shall not be ~~[is not]~~ subject to Kentucky sales tax. The purpose of the exemption in KRS 139.470(4)~~(5)~~ is to place common carriers on the same footing as other out-of-state purchasers who take title and possession of goods outside this state ~~[out-of-state]~~ without requiring retailers to use some other common carrier to transport the goods outside this state ~~[out-of-state]~~ to the purchasing common carrier. Thus, the exemption shall apply only~~[applies]~~ to tangible personal property shipped as cargo via the purchasing carrier. It shall ~~[does]~~ not apply to tangible personal property placed in use by the purchasing common carrier in this state.

(b) Examples of when the exemption shall ~~[does]~~ apply include:

1. Bulk ~~[bulk]~~ purchases of inventory items by a common carrier for immediate transport and storage outside this state;

2. Purchases ~~[purchases]~~ of tangible personal property by a common carrier for immediate shipment outside this state ~~[out-of-state]~~ without removal of the property from its original container within this state; and

3. Purchases ~~[purchases]~~ of jet fuel by a common carrier placed in a tanker vehicle in this state for immediate transport outside this state ~~[out-of-state]~~ where the fuel will be placed in the tanks of the planes which will consume it.

(c) Examples of when the exemption shall ~~[does]~~ not apply include:

1. Purchases ~~[purchases]~~ of repair parts by a common carrier for the carrier's own vehicles which are installed within this state;

2. Purchases ~~[purchases]~~ of components and furnishings for the common carrier's vehicles which are placed in use in this state; and

3. Purchases ~~[purchases]~~ of jet fuel placed in the tanks of the common carrier's plane which will consume it within this state, regardless of whether all of the fuel purchased will be consumed within this state.

(d) Mere compliance with the bill of lading requirements pursuant to KRS 139.470(4) shall not exempt a purchase ~~[of the exemption statute does not entitle a purchase to exempt status]~~ if the tangible personal property is placed in use before leaving this state.

(4) The sales tax shall ~~[does]~~ not apply to gross receipts from sales of property sold to a foreign purchaser for shipment abroad and delivered to a ship, airplane, or other conveyance furnished by the purchaser for the purpose of carrying the property abroad if the property is~~[and]~~ actually carried to a foreign destination, with title and control of the property passing to the foreign purchaser upon delivery, and no portion of the property is being used or consumed in the United States.

(5) The sales tax shall~~[does]~~ not apply to gross receipts from sales of industrial machinery for use out of state pursuant to KRS 139.486. ~~[As defined by KRS 139.486 when such machinery is delivered to a manufacturer or processor, or their agent for use out of state. Industri-~~

~~al machinery will be presumed for sale, use, storage or consumption out of state if:~~

~~(a) Delivery is to a common carrier, whether chosen by the seller or by the purchaser, and whether F.O.B. seller's shipping point or F.O.B. purchaser's destination, provided the shipping document indicates delivery to a location outside the state; or~~

~~(b) Delivery is made by seller's own transportation vehicles to a location outside the state.]~~

~~(6) To establish that the gross receipts from any given sale are exempt because the tangible personal property is delivered by the seller from a point within this state to a point outside this state, under the terms of an agreement with the purchaser, the seller shall ~~[will]~~ be required to retain in its ~~[his]~~ records documentary evidence which satisfies the department ~~[cabinet]~~ that there was such an agreement and a bona fide delivery outside this state of the property ~~[which was] sold.~~~~

Section 3. Use Tax: Transactions Consummated Outside Kentucky. (1) The use tax shall apply ~~[applies]~~ to sales consummated outside Kentucky when the tangible personal property sold is delivered ~~[shipped]~~ to the purchaser in this state or digital property is purchased for storage, use, or other consumption in this state. Examples of ~~[such]~~ transactions subject to use tax shall include:

(a) An order for goods [is] consummated ~~[completed and accepted (consummated)]~~ outside Kentucky and the seller's branch office or other place of business in this state is utilized in any way, such as in receiving the order, distributing the goods, ~~[and/] or~~ billing for the merchandise; ~~[, or]~~

(b) An order for goods [is] given in this state to an agent of an out-of-state seller who transmits the order to a point outside Kentucky for acceptance; ~~[,]~~ or

(c) An order for goods that results from the solicitation in this state of the purchaser by an agent of an out-of-state seller and the order is sent by the purchaser directly to a point outside Kentucky for acceptance.

(2) The use tax applies with respect to any tangible personal property or digital property purchased for storage, use, or other consumption in this state, the sale of which is exempt from sales tax under this administrative regulation, except property not subject to the sales or use tax or property held or stored in this state for sale in the regular course of business or subsequent use solely outside this state, and except property purchased for use in interstate or foreign commerce, placed in use in interstate or foreign commerce, prior to its entry into this state, and thereafter used continuously in interstate or foreign commerce.[]

~~(3) "Storage" and "use" do not include the keeping, retaining, or exercising any right or power over tangible personal property for the purpose of subsequently transporting it outside the state for use thereafter solely outside the state, or for the purpose of being processed, or manufactured into, attached to, or incorporated into, other tangible personal property to be transported outside the state and thereafter used solely outside the state.~~

~~Section 4. The term "consummated" as used in this administrative regulation means the point at which a sales transaction is completed and accepted to the extent that both the seller and the purchaser are legally committed to fulfill the transaction.]~~

THOMAS B. MILLER, Commissioner

APPROVED BY AGENCY: July 13, 2021

FILED WITH LRC: July 13, 2021 at 1:16 p.m.

PUBLIC HEARING AND PUBLIC COMMENT PERIOD: A public hearing on this administrative regulation shall be held on September 22, 2021, at 10:00 a.m. in Room 11A, State Office Building, 501 High Street, Frankfort, Kentucky 40601. The hearing may be conducted by video

teleconference at the discretion of the agency. An individual interested in being heard at this hearing shall provide written notification to the agency of the intention to attend the hearing at least five (5) business days prior to the date scheduled for the hearing.. If no notification of intent to attend the hearing is received by that date, the hearing will be cancelled. The hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation. Written comments shall be accepted through September 30, 2021. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person.

CONTACT PERSON: Gary Morris, Executive Director, Office of Tax Policy and Regulation, Department of Revenue, 501 High Street, Station 1, Frankfort, Kentucky 40601, phone (502) 564-0424, fax (502) 564-3875, email Gary.Morris@ky.gov.

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Contact Person: Gary Morris

(1) Provide a brief summary of:

(a) What this administrative regulation does: This administrative regulation is an amendment that updates regulatory language to clarify previous guidance contained, update definitions and make updates to conform with 13A drafting requirements related to transactions in interstate and foreign commerce.

(b) The necessity of this administrative regulation: The amendment is necessary to update outdated regulatory language; to clarify the guidance previously contained herein; to clarify previous guidance contained, update definitions and make updates to conform with 13A drafting requirements

(c) How this administrative regulation conforms to the content of the authorizing statutes: The proposed amendment updates regulatory language to conform with KRS 131.130 and KRS 131.131.

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: The proposed amendment updates regulatory language to clarify the tax treatment of transactions in interstate and foreign commerce.

(2) If this is an amendment to an existing administrative regulation, provide a brief summary of:

(a) How the amendment will change this existing administrative regulation: The amendment will change this existing administrative regulation by adding definitions for “industrial machinery”, “seller”, and “use”, moving the definitions for “consummated” and “receive” into Section 1 per 13A drafting requirements, updating other 13A requirements (for instance, “shall” versus “will”), adding statutory references, and clarifying language on the tax treatment of transactions in interstate and foreign commerce.

(b) The necessity of the amendment to this administrative regulation: See (1)(b).

(c) How the amendment conforms to the content of the authorizing statutes: See (1)(c).

(d) How the amendment will assist in the effective administration of the statutes: See (1)(d).

(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation: All individuals, businesses and organizations, or state and local governments that provide sell or buy in interstate and foreign commerce would be affected by the amendment to this regulation..

(4) Provide an analysis of how the entities identified in question (3) will be impacted by ei-

ther the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including:

(a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment: No additional actions are required by the amendment to the regulation.

(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3): No additional actions are required by complying with the amendment to the regulation.

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3): Taxpayers will benefit from the updated guidance herein to help them stay in good standing with the Department of Revenue.

(5) Provide an estimate of how much it will cost the administrative body to implement this administrative regulation:

(a) Initially: There is no expected cost to implement the proposed amendment.

(b) On a continuing basis: There is no cost expected on a continual basis.

(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation: Current departmental staff and funding will be used to implement and enforce this proposed amendment.

(7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new, or by the change if it is an amendment: No additional funding or increase in fees is needed.

(8) State whether or not this administrative regulation established any fees or directly or indirectly increased any fees: No fees are directly or indirectly established or increased by the proposed amendment.

(9) TIERING: Is tiering applied? Tiering is not applicable as the proposed amended regulation will be applied equally to all entities impacted by it.

FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

1. What units, parts or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation? The Finance and Administration Cabinet, Department of Revenue is the only government entity impacted by this amendment.

2. Identify each state or federal statute or federal regulation that requires or authorizes the action taken by the administrative regulation. KRS 131.130 and KRS 131.131.

3. Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the administrative regulation is to be in effect.

(a) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year? None.

(b) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years? None.

(c) How much will it cost to administer this program for the first year? No additional costs will be incurred in the first year of this regulation being in effect.

(d) How much will it cost to administer this program for subsequent years? No additional costs will be incurred in subsequent years.

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain

the fiscal impact of the administrative regulation.

Revenues (+/-): + See 3.(a) for explanation.

Expenditures (+/-): None.

Other Explanation: